Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	**CS Docket No. 97-80**
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	**PP Docket No. 00-67**
	)	

OPPOSITION OF STARZ ENCORE GROUP LLC TO PETITION FOR RECONSIDERATION

STARZ ENCORE GROUP LLC

Richard H. Waysdorf
Richard Turner
Tim Sweeney

Starz Encore Group LLC
8900 Liberty Circle
Englewood, CO 80112
Telephone: (720) 852-7700

Of Counsel:

Martin L. Stern
Preston Gates Ellis &
Rouvelas Meads LLP
1735 New York Avenue, N.W.
Washington, DC 20006
(202) 628-1700

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Starz Encore Group LLC ("Starz") submits this Opposition ("Opposition") to the Petition for Reconsideration filed in the above-captioned proceeding by the Motion Picture Association of America, Inc. ("MPAA") on December 29, 2003. MPAA's Petition seeks reconsideration of certain aspects of the Commission's recent Second Report and Order and Second Further Notice of Proposed Rulemaking in the captioned docket, FCC 03-225, released October 9, 2003 ("Plug & Play Order"). As set forth below, Starz's Opposition is limited to two of the issues raised by MPAA, and on a procedural issue raised by MPAA, Starz partially supports MPAA's position.

I. Summary

In its Petition for Reconsideration, MPAA asks the Commission to reconsider its decision to designate Subscription Video On Demand ("SVOD") service as an "Undefined Business Model." MPAA argues instead that SVOD should be considered a "Defined Business Model" that is allowed to be encoded as restrictively as "Copy Never." Starz strongly opposes MPAA's position on this issue. The Commission's determination to classify

all SVOD services as "Undefined Business Models" was a rational and appropriate way to resolve the sometimes competing concerns of copyright owners, programming networks, multichannel video programming distributors ("MVPDs"), and consumers. The Commission's decision wisely recognizes that there may be different business models for SVOD services that may justify different levels of copy protection encoding. Starz is confident that Copy Once encoding is appropriate for the type of business model of its own SVOD service (Starz On Demand), which is linked to its linear premium program network (STARZ!) and which shares the same movie titles in the same exhibition windows as that linear service. However, Starz recognizes that there may be other SVOD business models that may be more appropriately and legally encoded as Copy Never, or even Copy Unlimited. The Commission's approach allows the flexibility for different levels of copy protection for different SVOD business models, rather than the overly restrictive, "one size fits all" approach urged by MPAA.

At the same time, Starz submits that if the Commission were to reclassify all types of SVOD as a "Defined Business Model" as urged by MPAA, existing law and precedent would dictate that such SVOD services be allowed to be encoded no more restrictively than "Copy Once." As demonstrated herein, the existing business models for SVOD, such as Starz On Demand, fall within the types of program services for which consumers reasonably and legitimately expect to be able to make a single copy of programs for personal use. Removing that well-established ability to make a single copy of such SVOD programs for home use would violate prior copyright decisions and Congressional intent, and would potentially diminish the quality of the service as currently provided.

As a secondary matter, MPAA asks the Commission to modify the procedures for announcing and challenging the encoding selected for a new Undefined Business Model, and

suggests certain means of streamlining that procedure. Starz agrees that the Commission should consider streamlining the procedures in one respect suggested by MPAA. Finally, MPAA's position that the encoding rules promulgated by the FCC not abrogate private agreements, should be rejected as untenable.

II. MPAA Provides No Basis For Shifting SVOD to a "Defined Business Model" that Would Be Subject to Copy Never Encoding

MPAA argues, in its Petition for Reconsideration at pages 4-6, that the Commission erred in removing SVOD from the class of business models that could be encoded as restrictively as "Copy Never," as had been specified in the private Memorandum of Understanding entered into among cable operators and consumer electronics manufacturers that served as the foundation for the Plug and Play Order.[1] The Commission decided instead to classify SVOD as an "Undefined Business Model," in order to "allow[] SVOD to more fully develop as a program offering in the marketplace and . . . afford MVPDs more flexibility in the encoding of different forms of this service." Plug & Play Order, ¶ 74. MPAA claims that the Commission's decision "unnecessarily tampers with the unvarying decision of the content distribution marketplace that SVOD requires the full range of possible encoding schemes, up to and including 'Copy Never.'" MPAA Petition for Reconsideration at p. 5. MPAA further argues that "the SVOD business model is very similar to VOD," and that in the case of SVOD, "the market will bear encodings up to and including 'Copy Never,'" because "[c]onsumers of several SVOD services willingly pay for such services in large enough numbers to make them economically viable, even where the content is marked as

[1] *See* Memorandum of Understanding submitted to the Commission by Letter from Carl E. Vogel, President & CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (December 19, 2002) (attaching Memorandum of Understanding ("Cable-CE MOU")).

"Copy Never."[2] Finally, MPAA contends that "Copy Never" is justified because the earlier "5C Agreement"[3] allowed SVOD to be marked as restrictively as "Copy Never."

None of these arguments vaguely sketched out by MPAA justify reversal of the Commission's well-considered conclusion to classify SVOD as an Undefined Business Model, which would allow MVPDs in the first instance to specify the appropriate level of copy encoding. Rather, the Commission's determination to classify SVOD as an "undefined Business Model," subject to the copy protection determination process set forth in Section 76.1906 of the new Rules is a rational and appropriate way to resolve the deeply conflicting demands of critically interested parties. As the Commission observed, SVOD services are new and developing, and the SVOD services that are developed by certain entities may differ significantly from the SVOD services developed by others. Plug and Play Order, ¶ 74. Different levels of copy protection may be warranted and appropriate depending on the nature of the SVOD service that is developed.

Thus the Commission's approach allows for an SVOD service like the Starz on Demand business model -- which is tied to a linear premium programming network (STARZ!) and shares with STARZ! the same movie titles in the same exhibition windows -- to have the same level of copy protection, Copy Once, as the linked linear premium channel itself. At the same time, the Commission's approach allows for a higher level of copy protection, e.g., Copy Never, for a different SVOD business model, as has been posited by certain Hollywood

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[2] It is far from clear what basis MPAA has for this assertion since at the present time, SVOD is not yet marked "Copy Never," and technology to prevent copying is not in wide commercial use.

[3] *See* DTLA Adopters Agreement, Exh. B, Part 2, ¶2.1.1.3. It is interesting to note that the MPAA never officially endorsed the 5C agreement, nor was it ever adopted by more than two MPAA members. *See* DTLA Press Release, *DTLA, Sony Pictures Entertainment and Warner Bros. Announce First Studio Licenses for Digital Home Network Technology*, July 17, 2001 (http://www.dtcp.com/data/press/DTCP_PRESS_010717.pdf).

studios, which might, for example, consist of earlier window first run films (the pay-per-view window) that is not tied to a linear cable channel at all.

The Commission's decision similarly would allow for a lower level of copy protection – Copy Unlimited - for yet another type of "basic" SVOD service that might be offered by local broadcast stations, again, matching the level of copy protection to the linear channel to which the particular SVOD service is linked. As each business model is developed and presented, the Commission can (if necessary due to an objection) resolve the appropriate level of copy protection based on all relevant legal and business model considerations.

Contrary to MPAA's contentions, MPAA's approach – to allow all SVOD to be encoded as restrictively as Copy Never – does not allow for the same level of flexibility for different SVOD business models, nor does such a regime respect the legitimate and reasonable expectations of consumers to be able to make limited copies of certain types of programs for home use. If all SVOD can be encoded as restrictively as Copy Never, the MPAA member studios, which control virtually all American movie titles, will undoubtedly require in their agreements that all movie-based SVOD services be encoded as Copy Never. In any regulatory regime where Copy Never is permissible, Copy Never will be the non-negotiable requirement for SVOD exhibitions for all movie licenses, period. As set forth in detail below, however, Copy Never is too restrictive for a movie-based SVOD service like Starz on Demand that is linked to a linear premium service (STARZ!) that is designated as Copy Once. Copy Never encoding for services such as Starz On Demand would, as demonstrated below, conflict with established copyright principles of fair use, as well as Congressional determinations of appropriate copy protection levels for similar types of subscription video services. Copy Never designation for all SVOD services, especially for the most developed SVOD services like Starz On Demand that are linked to premium linear cable

networks, would violate consumers' rights in this area and deprive them of limited copying rights for home time-shifting purposes that they now enjoy.

The Commission's determination to place SVOD in the Undefined Business Model category is a realistic and rational resolution to the suggestion raised by MPAA that there may be newer versions of SVOD (other than the model established by Starz) that may warrant more restrictive copy protection. As noted above, it is possible that another version of SVOD utilizing earlier pay-per-view window films and not linked to a premium cable network service might be developed as this segment develops. The Commission's decision to classify SVOD as an Undefined Business Model would allow interested parties to make the case that this new and different business model warrants more restrictive Copy Never protection. The studios could assert that such a higher level of copy protection is defensible and appropriate for an early-window SVOD offering under prior copyright precedent, since those films are tied to the earlier pay-per-view window for which consumers may indeed be shown to reasonably expect to be Copy Never. MPAA and its designated provider of such an as yet undeveloped service could perhaps make that case, and seek Copy Never encoding for that very different type of SVOD service. But the type of SVOD service already provided by Starz (Starz On Demand) is a business model that is more appropriately designated as Copy Once, and Starz is prepared to make that case as well if necessary under the Commission's Undefined Business Model encoding determination procedures. The Commission's determination to classify all SVOD services as Undefined Business Models is a well considered approach to the different legal and policy considerations involved in these conflicting SVOD business models and reconsideration of this determination should be denied.

III. If SVOD Is Deemed to Be a Defined Business Model, SVOD Should Be Encoded No More Restrictively than Copy Once

Should the Commission, however, be inclined to reconsider its classification of SVOD as an Undefined Business Model and instead reclassify the service as a Defined Business Model, then the Commission must make clear that SVOD can be encoded no more restrictively than "Copy Once." Starz notes, as it had earlier argued in its Comments and Reply Comments previously filed in this proceeding, that as a Defined Business Model (as posed in the Cable-CE MOU), SVOD was most certainly to be encoded no more restrictively than "Copy Once." Starz demonstrated that the MOU, in including SVOD among the business models that could be encoded as Copy Never, had departed from both the principles expressed by Congress in related contexts and consumers' reasonable expectations of their ability to make a single copy of such SVOD content for personal use. While Starz recognizes that as a policy matter, the Commission was correct in allowing the flexibility to assign different levels of copy protection encoding for different types of SVOD business models (as embodied in the Plug and Play Order), if the Commission does determine to take a step backwards and place SVOD in the Defined Business Model category as urged by MPAA, then the Commission must make clear that SVOD can be encoded no more restrictively than "Copy Once."

Starz, while recognizing the critical need to protect video programming against piracy, seeks the optimum and appropriate balance between the reasonable and legitimate expectations of consumers to make a single copy for home use time shifting purposes, and the right of content owners to exploit and protect their content. Consistent with that balance, Starz, in its Comments and Reply Comments, argued that any rules adopted by the Commission should allow for a single copy to be made ("Copy Once") of SVOD

programming. As noted above, however, Starz recognizes that there may be newer SVOD business models, yet to be launched, that might rationally be able to justify more restrictive copy protection regimes such as Copy Never (for example, a subscription movie service featuring earlier pay-per-view window feature films not linked to a linear premium cable network). Starz agrees with the Commission that the best way to facilitate the introduction of alternative structures is to classify all SVOD as an Undefined Business Model as provided in the Plug and Play Order, and allow for the designation of copy protection at the time of launch.

Alternatively, the Commission could classify the type of SVOD service provided by Starz – linked to a premium linear network and sharing the same window as the programs on the linear network – as a Defined Business Model that can be encoded no more restrictively than Copy Once, while leaving the option for entities to create new types of SVOD services that do not share these characteristics and that would thus be classified as Undefined Business Models. Such new types of SVOD services, as Undefined Business Models, would then be allowed to be encoded with whatever level of copy protection that the proponent seeks to impose pursuant to the Undefined Business Model procedures. But if the Commission were to determine that the type of SVOD offered by Starz is a Defined Business Model, then the Commission must also determine that this type of SVOD business model must be encoded no more restrictively than Copy Once. And if the Commission determines to adopt a "one size fits all" level of copy protection adopted for SVOD as proposed by MPAA, then that level of copy protection encoding must be no more restrictive than Copy Once.

A. Clear Definition of the Term "VOD" Explains Why SVOD Can Only Be Properly Classified as Copy Once

Copyright protection is fundamentally a matter for determination by Congress, not by the Commission.[4] Whether with reference to a Defined Business Model or an Undefined Business Model, in order for the Commission to approve copy protection encoding rules, it must find that such copy protection rules are consistent with Congressional determinations and court decisions that apply and interpret such Congressional determinations. That private parties come up with encoding rules that suit their business goals is not enough; private parties and private agreements cannot abrogate consumers' rights under copyright law, as determined by Congress and interpreted by the courts.

Under long-settled copyright law, fair use is a defense to a claim that an unauthorized copy of a copyrighted work infringes the copyright owner's ownership rights. Fair use is an equitable rule of reason. Sony Corporation of America et. al. v. Universal City Studios, Inc., et. al., 464 U.S. 417, 448 ("Betamax"). In the home video context, copying for time-shifting purposes is one form of legitimate fair use. Id., at 456. Starz submits that Betamax requires that consumers should be permitted to make a single copy of SVOD transmissions for time-shifting purposes.

The U.S. Supreme Court in Betamax stated that "time-shifting for private home use must be characterized as a noncommercial, nonprofit activity." Betamax, supra, at 448. Any "challenge to a non-commercial use of a copyrighted work requires proof either that a particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." Id., at 451.

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[4] *See, e.g.,* Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 F.C.C.2d 580, ¶¶ 11-12 (1970) (finding that the "arena for definitive resolution of [the copyright] issue remains the Congress, not this Agency . . ." in declining to propose charges to be imposed on cable operators in connection with the importation of distant signals).

While Betamax dealt with free broadcasts, the principles are no less applicable to pay television transmissions such as those of Starz. In Betamax, the Court noted "that time-shifting merely enables a viewer to see a work which he had been invited to witness in its entirety free of charge." Id., at 449. Similarly, in Starz's linear pay television and SVOD services, a consumer is invited to view all of the programming exhibited on Starz's services for a single monthly fee. Just as in Betamax, it is reasonable for the consumer to expect that he or she can make a copy of such programming for private home viewing at a time convenient to the consumer. The argument is in fact stronger for the pay television and SVOD consumer, in that he or she has actually paid a fee to get access to the programming.

Since Betamax, consumers have come to reasonably and legitimately expect that they can make one copy for personal use of programming delivered by pay television providers such as Starz. Through its SVOD offerings, Starz is now delivering its pay television services in an "on-demand" environment. This change does not alter the expectation of the consumer. If the consumer pays a subscription fee, he reasonably expects that he can make a personal copy of Starz's programming for time-shifting purposes, whether from the scheduled service or the SVOD service.

While MPAA might argue that the "on-demand" nature of SVOD programming obviates the need for time shifting, this is not the case. Today, a particular program may be shown on a scheduled linear service once or several times. The consumer, however, is free to make a copy of any particular exhibition of a program from the linear service for later viewing at the viewer's convenience, without being required to check every day of the entire monthly schedule to see if the program might be available for a later viewing. With SVOD, the programmer (Starz in our case) offers unlimited viewing of its selected programs over a very limited time period, which is subject to change by the programmer. Because the

programmer controls rotations of SVOD programs during any month, the consumer may or may not be aware when an SVOD program will no longer be available. Just as on a linear schedule, the consumer will have a reasonable expectation that he can elect to record an SVOD program for later viewing.

Allowing SVOD to be included in Copy Once is not harmful to copyright owners, and will not adversely affect the potential market for the copyrighted works that Starz licenses for its services. By definition, in order for a consumer to be able to copy a program off of an SVOD service, Starz (or some other provider) will already have had to license such program from the copyright holder, presumably in exchange for valuable consideration. The commercial value of that transaction remains intact. As to an argument that widespread copying will harm the copyright owners, perhaps damaging videocassette or DVD sales or subsequent licensing to other television programmers, this is simply not the case. Consumers have had the ability to make copies for personal use since at least the Betamax case in 1984. Since that time, the sales and rentals of pre-recorded videocassettes and DVDs have grown to over $20 Billion in annual retail sales for 2002. "DVD Dollar Derby," Variety.com, January 8, 2003. Indeed, in the current environment where there is not yet any effective technical prevention against recording premium video programming whether by videotape or recordable DVDs, sales of DVDs of such premium programming are exploding. "Where the Real $ Is for Sexy HBO," Media Life, February 26, 2004; "TV Reruns on DVD Billion-Dollar Baby," Denver Post, February 22, 2004. If copying from scheduled subscription pay television were materially harmful to other uses of the copyrighted work, then not only would VHS and DVD sales not have grown, but SVOD itself would not be an economically viable service. But history shows otherwise: home copying for personal use in the 20 years since Betamax has not prevented the rapid increase in VHS and DVD sales and rentals. Home

copying has not stopped the development of SVOD. And preventing the potential for the unduly restrictive categorization of SVOD as Copy Never will not harm VHS, DVD or SVOD sales.

In fact, if the ability of consumers to view programming on SVOD lessens the amount of copying that consumers do, then the MPAA's argument that SVOD should not be Copy Once is weakened, in that there will be less potential harm to the market from home copying of SVOD than there is from home copying of scheduled services simply because consumers will engage in less time-shift copying. Yet no one has suggested that scheduled program networks should be any more restrictive than Copy Once. Thus even if the MPAA prevails, consumers will still be able to make copies from linear programming. So in the current environment, where programs are on both scheduled and on demand subscription services, there is no additional protection granted to the copyright holder by placing SVOD in the Copy Never Category. If a consumer wants to copy a program, and is not able to make one from the on demand subscription service, then the consumer can simply make a copy from the scheduled service. Adopting a rule, as MPAA urges, that would prohibit consumers from doing so from the SVOD service creates an illogical and frustrating environment for the consumer that accomplishes nothing for the copyright owner. The lack of harm to copyright owners is critical here: the harm to the copyright owner, or the lack of such harm, are critical factors in determining whether limited copying can be considered "fair use." Betamax, supra, at 451. In this case, there is no demonstrable harm to the copyright owners from allowing a single personal use copy of an SVOD program for time shifting purposes.

At the same time, SVOD is still very new, and has just barely been rolled out in a small number of cable systems around the country. Although SVOD promises a revolutionary level of consumer convenience, the service has not yet been broadly launched

and has not yet been broadly accepted by consumers. At the same time, Starz has paid in advance for SVOD rights from its program suppliers, the Hollywood studios, resulting in substantial incremental revenue to such studios. Limited copying rights, that is, Copy Once for personal time shifting purposes, preserves the expectations of consumers and enhances the value of SVOD to subscribers. If SVOD is rendered less attractive to subscribers because of unreasonably restrictive personal copying rights, that is, Copy Never, in opposition to consumers' reasonable expectations, then SVOD may fail as a viable service, resulting in less incremental revenues to the studios in the long run. Consumers will be confused and frustrated if they are allowed to copy a program on a digital or analog linear service, but are prevented from making a copy of the same program on a related SVOD service. While the reduction in incremental revenues is a likely long term harm to the studios if SVOD is placed in the Copy Never class, such potential harm is in contrast to no other cognizable or theoretical harm to such copyright owners if SVOD is moved into the Copy Once category. For all of the foregoing reasons, copyright owners have no basis whatsoever to contend they are economically harmed by categorizing SVOD as Copy Once, the same as linear services.

B. The Fair Use Principles Embodied in the DMCA Support Copy Once Encoding for SVOD

While Congress has elected in the past to not set a bright line test of fair use, it has, in the Digital Millennium Copyright Act ("DMCA"), addressed what it believed to be the reasonable and legitimate expectations of consumers to make fair use of and copy analog programming on certain analog devices. While SVOD transmissions will be digital, from a consumer perspective, and in a fair use analysis, there is no difference between analog and digital transmissions: the consumer is aware of watching a program on his or her television screen, not of the technology or means of transmission or reception of the signal, and so the consumer's reasonable expectation with respect to personal use copying remains the same

with analog or digital transmissions. The fair use principles contained in the DMCA are consumer driven, and provide an equitable balance between the interests of the copyright owner and the consumer. H.R. Rep. No. 105-796, at 70 (1998), *reprinted in* U.S.C.C.A.N. 639, 756-57 ("Conference Report").

In the DMCA, Congress divided televised programming into two categories for copy protection purposes: Copy Never and Copy Once. DMCA §§ 1201(k)(2)(A) and (B). In the Copy Never category, Congress included programming which had a "single transmission, or specified group of transmissions, . . . for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions." Id., § 1201(k)(2)(A). Congress clearly intended this category of programming to include pay-per-view ("PPV"), video on demand ("VOD") (in its transactional *business model* sense) and near video on demand ("NVOD"). Conference Report, p. 70.

Alternatively, in the Copy Once category, Congress included programming which "is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service." DMCA § 1201(k)(2)(B). As above, the legislative history (Conference Report, p. 70) clearly demonstrates Congressional intent to include in the Copy Once category subscription pay television services, such as those provided by Starz on its linear programming services STARZ!, Encore[SM] and their respective multiplexed channels.

SVOD, as is currently being offered by Starz (as well as other premium programming services such as HBO and Showtime), was not directly addressed by the DMCA since it had

not yet been developed. However, as set forth above, the categories and definitions of Copy Once business models enunciated in the DMCA are readily applicable to SVOD. For the SVOD service, a consumer pays a monthly subscription fee which entitles the consumer to see all the programming which Starz offers on the SVOD service. After the consumer subscribes, the consumer selects the program he or she wants to watch, from a SVOD schedule provided by Starz, and the program is provided immediately after the selection has been made.

While it may seem like SVOD might fit into both the Copy Never and the Copy Once categories (and so would be included in the Copy Never category under DMCA § 1201(k)(2)), this is not the case. SVOD does *not* fit into the Copy Never category. As noted above, to be included in the Copy Never category under the DMCA, a consumer must be "charged a separate fee for each such transmission or specified group of transmissions." DMCA § 1201(k)(2)(A). With SVOD, a consumer is not charged a separate fee for each transmission. Rather, the consumer pays a monthly subscription fee in order to view all of the provided programming. Also, the subscription fee is not a separate fee for a specified group of transmissions. The consumer does not choose any specific group of transmissions. Rather, Starz offers the consumer the ability to watch an unlimited number of transmissions over a specified period of time, from the SVOD program schedules. Starz sets what programming will be offered during the period of time, both the number and the specific programs. The consumer selects which particular program to watch, but does not pay a separate fee for a specified program or number of transmissions. In other words, with VOD, NVOD and PPV, the consumer picks a *particular program* or *group of programs* and pays a specified fee, while with SVOD, the consumer subscribes and pays for a *particular service*, not a particular

program or group of programs. Therefore, based on the language of the DMCA, it is clear that SVOD should be included in the Copy Once category.

C. Both the 5C Agreement and the Memorandum of Understanding Departed from the Fair Use Principles Embodied in the DMCA

Subsequent to the passage of the DMCA, two non-legislative and non-regulatory events have occurred which purport to interpret the words of the DMCA but which do so incorrectly. The first was the agreement between consumer electronics manufacturers Matsushita, Sony, Toshiba, Hitachi and Intel, commonly known as the "5C" Agreement, announced late in 1998, and the second is the recent "Plug and Play" agreement embodied in the Cable-CE MOU.

Both of these agreements incorrectly included SVOD in the Copy Never category. Both agreements did so by significantly distorting the plain language and intent of the DMCA. Where the DMCA provides that to be included in Copy Never a consumer must be "charged a separate fee for each such transmission or *specified group of transmissions"* (DMCA § 1201(k)(2)(A) emphasis added), 5C and the Plug and Play MOU include SVOD in Copy Never (5C Agreement § 5.1(a)(i); MOU Proposed Rule 76.1903 § 2(b)(A)(i)), and both define SVOD as a transmission of a program "for which Program or specified group of Programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the *specified viewing period covered by the fee*." 5C Agreement § 1, definition of "Subscription-on-Demand"; MOU Proposed Rule 76.1902 § 1, definition of "Subscription-on-Demand" (emphasis added). Each of these agreements changes the fee aspect from a *separate* fee for specified programming (as specified by Congress in DMCA) to a *subscription* fee for a specified viewing period.

5C erred in including SVOD in Copy Never by mistakenly applying the term "VOD" embedded in Subscription VOD in its *business model* sense, when in fact the embedded term "VOD" merely defines the *technical distribution platform*. Unfortunately, four years later in the course of the MOU negotiations, the 5C mistake was carried over into the MOU. By their own declaration, the MOU negotiators began with the 5C agreement as their starting point for the business model classifications, divided into Copy Once, Copy Never, or unrestricted copying. Cover Letter to The Honorable Michael K. Powell, December 19, 2002, accompanying the filing of the MOU. Thus the MOU merely perpetuated 5C's erroneous classification of SVOD as Copy Never.

Over the last several years, regulators and industry commentators have begun to imprecisely use the term "VOD" interchangeably to describe two very different concepts--first, VOD as a *business model*, and second, VOD as a *technical distribution platform*. Clarifying the confusion inherent in these two fundamentally different usages helps demonstrate the error inherent in including SVOD in Copy Never under the proposed Encoding Rules, and the importance of including SVOD in Copy Once.

The DMCA used the term "VOD" purely in its *business model* sense, but subsequent misinterpretations of the DMCA have incorrectly used "VOD" in its *technical distribution platform* sense. In the DMCA, Congress established two categories of television programming: one category for which the copyright owner could prevent all copying ("Copy Never"), for pay-per-view ("PPV") and other transactional programming services; and a second category for which the copyright owner could prevent all copying other than the first copy ("Copy Once"), for subscription premium programming services. 17 USC § 1201(k) ("DMCA"). The Conference Report for the DMCA clearly demonstrates Congress's intent to include VOD (in its *business model* sense) in Copy Never. Conference Report, p. 70.

In each case, the technical distribution platform is neutral to the outcome under the DMCA. In no way does the platform over which such programming is distributed influence whether the programming fits into Copy Once or Copy Never. The Copy Once definition is based entirely on the subscription nature of the business model, while the Copy Never definition is based entirely on the transactional nature of the business model.

Separately, the term "VOD" has also come to be used to describe a *technical distribution platform* for television programming. Technical distribution platforms for multi-channel premium television have evolved in the United States through several distinct stages, culminating in VOD. MVPDs initially offered a single analog channel for each programming service. Subsequently, with the advent of digital compression, MVPDs offered multiple digital channels. Ultimately, MVPDs offered VOD, in its *technical distribution platform* sense, leveraging technical innovations such as two-way networks, video servers and user interface applications that enable subscribers to choose programming to view at times of his or her choosing, with full control over playback.

The term "subscription video on demand" has embedded within itself the phrase "video on demand," but in its sense as the most advanced *technical distribution platform*, unrelated to the concept of transactional VOD as a *business model*. The term also includes the word "subscription," which clearly defines the business model. Significantly, the term, "SVOD" overlays the subscription business model onto the VOD technical distribution platform. As such, SVOD can only be properly categorized among the other programming categories in the DMCA which are characterized by a subscription business model, for which Copy Once applies.

Copy Once has been the appropriate copy rule for offerings in the subscription business model, during each advance in the evolution of technical distribution platforms. To

switch to Copy Never for SVOD, as now urged by MPAA, would represent a significant departure from the DMCA, and a significant step backwards in consumer functionality and ease of use, contrary to the reasonable expectations of premium television subscribers.

Indeed, the MPAA's suggestion that all SVOD services should be permitted to be encoded as restrictively as Copy Never would potentially cause consumers to lose the ability to make copies of non-premium SVOD services under development by "basic" and "expanded basic" program networks, and even broadcast services.[5] Indeed, many observers believe that over the coming years SVOD-type services will replace many current linear channels – that is, that the cable world will move to a subscription video on demand structure for most types of viewing. Indeed, over time, linear channels may disappear entirely in favor of SVOD services. Yet even for basic and expanded basic service SVOD, the MPAA demands up to Copy Never encoding with the degree of such protection decided by private agreement between the copyright owners and networks. In this scenario, no one speaks for the consumer, whose ability to make a personal copy is being restricted from its present level. At the same time, the DMCA requires that no limitation could be placed on copying of the basic or extended basic tier of programming. DMCA, §1201(b)(2); Conference Report, p. 70. By allowing all types of SVOD to be encoded as restrictively as Copy Never, as MPAA suggests, then even these basic and extended basic types of programs would be shifted from Copy Unlimited as designated in the DMCA to Copy Never. This would be fundamentally at odds with the Congressional scheme set forth in the DMCA, and demonstrates the fallacy of MPAA's position that all SVOD programming be encoded up to Copy Never.

[5] For example, Discovery Networks, Comedy Central, BBC America, Outdoor Life, Food Network, and many other non-premium services have launched "basic" SVOD services.

D. Subjecting SVOD to Copy Never Encoding Would Be a Step Backwards and Create Intolerable Confusion for Consumers

Today, Starz On Demand, Starz's SVOD service, makes available on an on demand basis the same movies from the same exhibition window as are available on Starz's linear services (such as STARZ!, STARZ! Family®, and Encore). For example, during March 2003, a STARZ! subscriber can view "Monsters, Inc." on Starz On Demand (at times chosen by the subscriber), and can also view "Monsters, Inc." on STARZ! Family (at times set in the STARZ! Family linear schedule).

Confusingly, MPAA, in seeking to categorize SVOD as Copy Never, would allow this subscriber to make a single recording of "Monsters, Inc." if the subscriber viewed it on STARZ! Family (Copy Once under the Plug and Play Order), but no copies at all if that subscriber viewed it on Starz On Demand (Copy Never under the position advocated by MPAA). This is a baffling and frustrating consumer experience that would flow from the approach urged by MPAA, and is one which must be avoided.

There is no logical reason to provide for a stricter limitation on programs available on a digitally transmitted SVOD basis than those available on a digitally transmitted linear subscription basis. Under both means of exhibition, a program is only available on a schedule for a limited period of time. Such limited period of time during which a program can be viewed is one reason why consumers need to copy programs for time shifting purposes. If a consumer is unable to view a program at its scheduled time on a linear service, such consumer can record such program for viewing at a later time, as the Supreme Court held in Betamax. The consumer is not forced to research whether or not the program is scheduled at another, more convenient, time. The consumer simply has the right to record such program for later viewing.

Similarly, if a consumer sees that a particular program is available on the SVOD schedule, but the consumer cannot view the program at that time, the consumer should have the ability to record such program for later viewing. The consumer should not be forced to research how much longer it will be available on the schedule. Indeed, the consumer may have no means of determining when the program will be taken off the SVOD schedule. It may be taken off that night, or three weeks from then. The Betamax decision does not suggest that copying for time shifting purposes is less of a fair use if the recorded program is repeated numerous times on the linear schedule and thus more readily available. In any case, the consumer has paid a subscription fee for the ability to view the program on both a linear and on-demand basis. The consumer has the ability to make a copy from the linear exhibition, as well as the reasonable expectation of doing so. The consumer should have the ability to make a copy from the on-demand service as well.

Eliminating this ability to record from the SVOD service would be a significant step backwards for consumers. No party has suggested that subscription linear programming be any more restrictive than Copy Once. And for years, consumers have had the ability to make copies of programming purchased on a subscription basis. Why then should consumers have less ability and functionality than they have enjoyed in the past with respect to the same programming?

As Starz has previously demonstrated in this proceeding, the determination of whether a difference can be justified between SVOD and subscription linear services for copy protection purposes should flow from the fair use analysis, based on an equitable balancing of consumers' reasonable expectations against demonstrable harm to the economic interests of the copyright owners. As shown previously, consumers' reasonable expectations for a premium subscription service is for Copy Once to be the appropriate limitation. Indeed, no

one has suggested that Copy Once is not the consumers' legitimate expectations for linear subscription services, as shown by the inclusion of linear subscription services in the Copy Once category from the DMCA to 5C to the Cable-CE MOU. Also, as shown above, applying Copy Once to SVOD would result in no greater harm to the copyright owners' economic interests than applying Copy Once to linear subscription services. Given consumers' reasonable expectations and the lack of any different or greater economic harm to copyright owners, if the Commission were to accept MPAA's arguments and redefine all SVOD as a Defined Business Model, the Commission should be required to classify SVOD in the Copy Once category.

IV. MPAA's Apparent Contention that the Encoding Rules Should Not Abrogate Private Licensing Agreements Is Untenable

The MPAA's Petition for Reconsideration at page 9 asks the Commission to clarify "that it did not intend in Section 76.1908(a) to abrogate cable or satellite operators' negotiated contracts with content owners with respect to content protection." The MPAA thus asks the Commission to add a proviso at the end of Section 76.1908(a)[6] that would state: "provided that all other laws, regulations, *or licenses* applicable to such encoding, storage or management shall be unaffected by this section." MPAA Petition for Reconsideration, p. 10 (emphasis added). While it is far from clear what the MPAA's concern is with the existing regulation, it appears that it is suggesting that the new encoding rules adopted by the

[6] Section 76.1908(a) now reads as follows:

> Nothing in this subpart shall be construed as prohibiting a Covered Entity from:
> (a) encoding, storing or managing Commercial Audiovisual Content within its distribution system or within a Covered Product under the control of a Covered Entity's Commercially Adopted Access Control Method, provided that the outcome for the consumer from the application of the Encoding Rules set out in §§76.1904(a)-(b) is unchanged thereby when such Commercial Audiovisual Content is released to consumer control . . . .

Commission should not be construed to limit more restrictive encoding rules that appear in pre-existing private license agreements between content providers and MVPDs. Certainly, such a position that preexisting private license agreements would preempt the Commission's rules is an untenable argument. Rather, the Commission's rules take precedence notwithstanding any conflicting provisions in private license agreements. The Commission's rules on copy protection cannot be made subject to limitations of private agreements that are inconsistent with those rules.

V. The Commission Should Consider the Procedural Revisions Suggested by MPAA

MPAA also suggests that the "Undefined Business Model" procedures adopted by the Commission will be cumbersome to implement and will potentially lead to multitudes of proceedings before the Commission to determine the copying limitations for the same SVOD business model. MPAA suggests that the procedures be modified to provide that only an MVPD with a million subscribers can announce the launch of an Undefined Business Model, and that the time period during which a new Undefined Business Model will retain the announced copying level be shortened from two years to 90 days.

Starz recognizes that there may be an inordinate number of proceedings initiated if each individual cable system launching the same SVOD service must make its own announcement and commence and potentially defend such a proceeding. There is some merit to MPAA's suggestion that a means be adopted to allow for a more limited number of proceedings to decide the same issues. The Commission should examine other means of streamlining the potential number of multiple proceedings involving the same programming service. For example, limiting initial new Undefined Business Model announcements or proceedings to major MVPDs may help to streamline the complaint and review process.

However, Starz strongly disagrees with the suggestion that the announced level of copying for a new Undefined Business Model be limited to an initial period of 90 days rather than the two years provided in the Plug and Play Order adopted by the Commission. As the Commission noted in support of the two-year period, a substantial period of time is needed for a new business model to develop as envisioned by its developers so that it becomes viable. There is no justification to limit that period to only 90 days – no new business can develop viability in such a short period of time. MPAA's suggestion to limit the initial period to 90 days should be rejected.

VI. Conclusion

The Commission should reject MPAA's Petition for Reconsideration seeking to reclassify SVOD services as a Defined Business Model that may be encoded as restrictively as Copy Never. The MPAA has provided no justification for reversing the Commission's determination on this classification and offers nothing new on this issue. As the Commission observed, SVOD services are new and developing, and the SVOD services that are developed by certain entities may differ significantly from the SVOD services developed by others. Different levels of copy protection may be warranted and appropriate depending on the nature of the service that is developed. However, if the Commission were to move SVOD from an Undefined Business Model to a Defined Business Model, such a move must be made with the proviso that SVOD can be encoded no more restrictively than Copy Once, not Copy Never as MPPA argues. The Commission should reject copy prohibitions such as those suggested by MPAA for SVOD that are significantly more restrictive than those permitted by Congress in the DMCA. The Commission should avoid the consumer confusion attendant to a subscriber being prohibited from making any copies of a movie viewed via SVOD, even though at the same time the subscriber can make one copy of the exact same movie viewed via the linear

service of the programmer. If the Commission determines to change the definition of SVOD to a Defined Business Model, the Commission should determine that such SVOD services be encoded no more restrictively than Copy Once.

Respectfully submitted,

STARZ ENCORE GROUP LLC

By: _____/s/_____
Richard H. Waysdorf,
Vice President, Business Affairs-Affiliate Relations
Richard Turner,
Vice President, Business Affairs, Programming
Tim Sweeney,
Vice President, Business Affairs-Marketing and Intellectual Property

Starz Encore Group LLC
8900 Liberty Circle
Englewood, CO 80112
Telephone: (720) 852-7700

Of Counsel:

Martin L. Stern
Preston Gates Ellis &
Rouvelas Meads LLP
1735 New York Avenue, N.W.
Washington, DC 20006
(202) 628-1700

Dated: March 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2004, a copy of the foregoing Opposition of Starz Encore Group LLC to Petition for Reconsideration was served by hand on each of the persons listed on the attached service list.

_____/s/_____
Sharon Duke Agranov

SERVICE LIST

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jon Cody
Office of the Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Matthew Brill
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Stacy Robinson Fuller
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan B. Goldstein
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Catherine Crutcher Bohigian
Office of Commissioner Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Johanna Mikes Shelton
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

W. Kenneth Ferree, Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

William H. Johnson, Deputy Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Rich C. Chessen, Assistant Bureau Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Susan Mort
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Qualex International
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jon A. Baumgarten
Bruce E. Boyden
Proskauer Rose LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036